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In the Supreme Court of the United States

OCTOBER TERM, 1965

CARNATION COMPANY, PETITIONER

v.

PACIFIC WESTBOUND CONFERENCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION

OPINIONS BELOW

The memorandum opinion of the district court (R. 137–138) [1] is unreported. The opinion of the court of appeals (R. 157–187), and its opinion on petition for rehearing (R. 200–201), are reported at 336 F. 2d 650.

JURISDICTION

The order of the court of appeals denying a rehearing was entered on September 28, 1964 (R. 200). The petition for a writ of certiorari was filed on November 6, 1964 and was granted on March 1, 1965 (R. 203; 380 U.S. 905). The jurisdiction of this court is conferred by 28 U.S.C. 1254(1).

[1] "R." references are to the transcript of record.

QUESTION PRESENTED

Section 15 of the Shipping Act of 1916, as amended, requires carriers to obtain the approval of the Federal Maritime Commission before giving effect to any rate-fixing agreement and grants an exemption from the antitrust laws for any agreement approved by the Commission. The question presented is whether a shipper injured by a rate-fixing agreement which, the Commission has found, was unlawfully put into effect without its approval, may recover treble damages under the antitrust laws, or is restricted to the reparations remedy provided by the Shipping Act.

STATUTES INVOLVED

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 15, provides as follows:

> That any person who shall be injured in his business or property by reasons of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 15 of the Shipping Act, 1916, 39 Stat. 733, 46 U.S.C. (1958 ed.), 814, as it stood prior to its amendment in 1961,[2] provided in pertinent part:

> That every common carrier by water, or other person subject to this Act, shall file immediately with the [Federal Maritime Commission] a true

[2] Section 15 was amended in 1961 in certain respects not here material, 75 Stat. 763.

copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

* * * * *

All agreements, modifications, or cancellations made after the organization of the [Commission] shall be lawful only when and as long as approved by the [Commission], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto,

and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled, "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

STATEMENT

Petitioner, a shipper in foreign commerce, brought a treble damage action under the antitrust laws against two conferences of shipping lines and their carrier members, alleging injury as a result of secret, unapproved price-fixing agreements among the defendants. The conferences and member lines, as well as the Federal Maritime Commission, which had intervened as a defendant, moved to dismiss for lack of jurisdiction on the ground that the Shipping Act provides the exclusive remedy for the injuries resulting from rate-fixing agreements, whether or not these agreements have been approved by the Commission. The district court granted the motion and the court of appeals affirmed.

Petitioner's treble damage action, filed in 1962, arose out of disclosures made in a proceeding (Docket No. 872) instituted earlier by the Commission but not decided until July 1965, after this Court had granted certiorari in the instant case. Because of the close relationship between the matters covered by the Commission proceeding and the claims set forth in petitioner's complaint, and the relevance which the Commission report in Docket No. 872 may have to the appropriateness of deciding the principal issue before

the Court, a brief description of the Commission's report is included immediately after the description of the proceedings below.[3]

1. PETITIONER'S SUIT FOR TREBLE DAMAGES

a. THE FACTS ALLEGED IN THE COMPLAINT

Since the court below dismissed the complaint on motion, the allegations of the complaint must be taken as true. The facts recited are as follows:

Pacific Westbound Conference (PWC) and Far East Conference (FEC) are associations of ocean common carriers, each established under an agreement filed with and approved by the Commission pursuant to Section 15 of the Shipping Act (R. 16, 17–18). That section (*supra*, pp. 2–4) requires rate-fixing agreements among ocean carriers by water to be filed with the Commission and exempts approved agreements from the antitrust laws. The carrier members of the two conferences transport goods to the Far East—those in PWC from Pacific Coast ports and those in FEC from Atlantic Coast or Gulf ports (R. 16, 17).

Trade to the Far East from Atlantic Coast and Gulf ports is competitive with that from Pacific Coast ports (R. 18). In November 1952, the carrier members of PWC and of FEC entered into a joint agreement designated No. 8200 (R. 45–50), a memorandum of which was duly filed with and approved by the Commission (R. 18–19). The agreement provided

[3] The Commission's report is reproduced in the Appendix to petitioner's brief.

for joint conference action with respect to rates; however, it preserved the right of each conference, after notice to the other, to change rates independently (*ibid.*).

In January 1953, soon after Commission approval of Agreement No. 8200, the members of both conferences met and entered into a secret agreement not only to fix rates jointly but also to change rates on most items, including evaporated milk, only when both conferences agreed (R. 19–20). Pursuant to this agreement, in May 1957, PWC announced that the rates for the transportation of evaporated milk to the Philippines were increased $2.50 per ton (R. 21–22). In order to help meet European competition in the sale of evaporated milk, petitioner, a shipper of that product, requested PWC to reduce the rate to the pre-increase level. Although PWC was willing to grant petitioner's request, it declined to lower the rate because FEC would not concur in the reduction (R. 22). However, PWC did not disclose to petitioner that the real reason for not lowering the rate was FEC's refusal to concur; rather, PWC falsely informed petitioner that, after careful review, its own carrier members had agreed that no reduction was warranted (R. 23).

In October 1959, the Commission ordered an investigatory proceeding, numbered Docket 872, to determine whether Agreement 8200 "* * * is a true and complete agreement of the parties within the meaning of * * * section 15, and whether it is being carried out in a manner which makes it unjustly

iscriminatory or unfair * * *'' (R. 39–40). Peti-
ioner intervened in that proceeding in 1960 but did
ot ask for an award of reparations (R. 41–42).

In May 1961, as a result of disclosures made during
he Commission proceeding, petitioner learned for the
rst time of the unlawful agreement and of the facts
oncerning the rate increase and the refusal to grant
rate reduction (R. 23). During this same month,
Iay 1961, the conferences agreed that evaporated milk
e included on a list of "initiative" items, the conse-
uence of which was to allow PWC to set and change
he rate for this product without the concurrence of
'EC (R. 24). In May 1962, PWC reduced the rate
n evaporated milk by $2.50 per ton, the amount of
he increase in May 1957 (*ibid.*). In December 1962,
etitioner filed this action, seeking three times the
lamages it sustained for the period May 1957 to May
962 as the result of having been obliged to pay for
he transportation of its products at rates unlawfully
letermined (R. 25).

b. THE DECISIONS OF THE COURTS BELOW

The district court dismissed petitioner's complaint
n the grounds that the "Supreme Court has held that
he antitrust laws are superseded to the extent that the
Shipping Act provides a remedy" and that the Ship-
ing Act does provide a remedy for the carrying out
f a rate-fixing agreement between carriers without
pproval of the Commission (R. 137).

The court of appeals affirmed the dismissal. It held
that the matters complained of were within the pri-
nary jurisdiction of the Federal Maritime Commis-

sion" (R. 200), upon which "the Commission must necessarily employ a specialized judgment and a determination * * * not within the conventional experience of a judge or jury" (R. 181, 201). The court found it unnecessary, however, to resolve the question "whether there might ultimately arise out of the situation here presented a right to relief under the antitrust laws" (R. 187). In concluding that the complaint should be dismissed rather than retained on the district court's docket, the court of appeals stated (R. 187, n. 32):

> The only possible reason for allowing the action to be retained on the district court docket would be to avoid a claim that antitrust action was barred by the statute of limitations. Since we hold that such an action cannot at this date be maintained, this reason is not applicable here.

2. THE COMMISSION'S REPORT IN DOCKET NO. 872

After the Court's grant of certiorari in the instant case, the Commission rendered its report in Docket No. 872. After full administrative hearing, it held that PWC and FEC had in fact entered into a number of agreements relating to rate-making which were not within the purview of their earlier approved agreement (Agreement No. 8200) and which should have been submitted to the Commission for approval under Section 15 of the Shipping Act.[4] Included

[4] The Commission refused to approve the agreements in the pending proceedings on the grounds, among others, that they "consist of oral agreements reduced to memoranda, in the form of abstracts or summaries of minutes of meetings" and that "on

among these were the agreements challenged by Carnation which affected the fixing of rates for evaporated milk.

The Commission also held that FEC and PWC had subjected the petitioner as a shipper, West Coast ports as localities, and evaporated milk as a commodity, to unreasonable disadvantage in violation of Section 16 of the Shipping Act. It found that, despite persistent efforts, petitioner was unable to obtain from PWC a rate reduction for evaporated milk because of FEC's unwillingness to concur—not because PWC "was making its own decisions on rates based on the economics of shipment from the West Coast." FEC refused to concur in a rate reduction for evaporated milk shipped from the West Coast because such a reduction would adversely affect the rate FEC could charge for the movement of powdered milk from the East Coast.

Commissioner Patterson in a separate opinion agreed with the majority in all respects here material. He also expressed the view that the rate-fixing agreements which should have been, but had not been, submitted for Commission approval were not exempt from the antitrust laws.

The Commission ordered the respondents to "cease and desist from carrying out" their unfiled agreements "until filed with and approved by the Com-

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the basis of this record it is impossible to determine the scope of the unfiled supplementary agreements, the precise subjects covered by the agreements, the objectives to be achieved, and whether or not the agreements can be approved pursuant to the standards set forth in section 15 * * *."

mission." It did not award reparations to Carnation. Under Section 22 of the Shipping Act, the Commission cannot award reparations on its own motion but only on the request of a complainant prior to or during the administrative proceeding. Although Carnation had intervened, it did not ask the Commission for a money award.

ARGUMENT

INTRODUCTION AND SUMMARY

The basic question raised in this case is what remedies are available to shippers when carriers subject to the Shipping Act, 1916 act under a rate-fixing agreement which has not been filed with or approved by the Federal Maritime Commission. In particular, the question is whether the power of the Commission to grant reparations forecloses a shipper's right to sue for treble damages under the anti-trust laws.

It is the position of the Federal Maritime Commission that, under the Shipping Act, 1916, it has the exclusive and primary jurisdiction to determine whether conduct falls within the Shipping Act. It believes that, in order to best carry out a regulatory scheme regarding the ocean-commerce industry, jurisdiction should reside in the Commission to decide in all instances whether particular conduct is covered by an approved agreement. If the Federal Maritime Commission were to find that such conduct is not within the terms of an approved agreement, then that conduct would constitute a violation of the Shipping Act which provides penalties and remedies for

such violations. This is not to say, however, that one injured as a result of such conduct and after Federal Maritime Commission determination may not, in the Commission's view, have access to the courts under other statutes. As to that the Commission takes no position. The Solicitor General believes that the treble-damage remedies of the Clayton Act are plainly applicable so long as the court respects the primary jurisdiction of the Federal Maritime Commission to determine the rights and duties of carriers under the Shipping Act. His reasons for adopting this position are set forth below.

If the language of the Shipping Act alone were controlling, the answer would be clear; for Section 15 of the Shipping Act deals explicitly with the subject of antitrust remedies for price-fixing agreements, granting an exemption only for those agreements filed with, and approved by, the Federal Maritime Commission. The express exemption in the Act does not take into account, however, all the necessities of uniform application of the administrative scheme created by Congress. In light of these needs, the exemption has been broadened by decisions of this Court holding that, when judicial application of the antitrust laws threatens significant interference with the regulatory system administered by the Federal Maritime Commission, the antitrust proceedings cannot continue. *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474; *Far East Conference* v. *United States*, 342 U.S. 570.

An interference with the regulatory scheme of the Shipping Act is not, of course, a necessary conse-

quence of every possible difference between the results of judicial and administrative proceedings. There are two distinct situations: (A) If the court treats as unlawful what the Commission regards as authorized and proper conduct, the interference with the regulatory system is plain; (B) but if the court simply grants additional remedies for injurious conduct which the Commission has found to be unlawful, the judicial proceedings may further, rather than hinder, the operations of the Shipping Act. Our case falls into the second category.

A. That an unwarranted interference with the Shipping Act is the consequence of differing judicial and administrative definitions of what is lawful or unlawful for carriers is obvious; it is, moreover, the holding of *Cunard* and *Far East Conference*. Such interference is the likely consequence of any antitrust suit for an injunction, for the court is asked to enjoin conduct under a price-fixing agreement which might later be filed and approved by the Commission. Even if the carriers obtain Commission approval, they are forced to disobey the injunction in order to enjoy rights granted by the Shipping Act.

While the interference with the Shipping Act is less clear when a suit for treble damages, rather than an injunction, is brought by a shipper, the threat of interference remains significant. Where it is unclear whether an anticompetitive agreement has received Commission approval, a court might determine that it was not approved and accordingly penalize the carriers for acting under the agreement. The Commission, which has the basic responsibility for deter-

mining the scope of its approval of prior agreements and the need for seeking further approval of additional agreements, may conclude that the carriers required no further approval to act under the agreement. The carriers would then be penalized for conduct which the Commission regarded as authorized. That danger can be eliminated, however, if the treble-damage action is stayed—in any case in which the scope of prior Commission approval is uncertain—until the parties have invoked the primary jurisdiction of the Commission to determine whether a later agreement falls within the scope of a prior approved agreement and thus needs no further approval to be lawful. For then damages would be awarded only if the carriers' actions were determined, by the appropriate tribunal in each case, to violate both the Shipping Act and the Sherman Act.[5]

[5] The possibility of interference with the Shipping Act caused by an antitrust action *for an injunction* could also be eliminated, if the court (1) deferred to the primary jurisdiction of the Commission to determine if the agreement had been approved, and (2) even then, limited the scope of its injunction to forbidding actions under the agreement unless and until it is approved by the Commission. However, as this Court pointed out in *Far East Conference* v. *United States*, 342 U.S. at 576–577, there is little point in entertaining a suit for injunction under these limiting conditions. For, if the Commission, exercising its primary jurisdiction, finds the agreement was not approved, it will typically order the parties to cease and desist from giving effect to the agreement and thereby render the antitrust suit superfluous. As we shall show *infra* at pages 30–31, in *Far East Conference* this Court indicated that an antitrust suit for an injunction might be appropriate after the primary jurisdiction of the Commission had been invoked, if the Commission's order did not render an injunction unnecessary.

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B. There is a second way in which the results of judicial proceeding may differ from those of an administrative proceeding under the Shipping Act. Even if there is no possibility that the court would treat as unlawful what the Commission regards as lawful conduct—*i.e.* if, in any case of doubt as to whether an agreement has been approved, the treble-damage action is allowed to proceed only after the Commission itself has determined that carriers have acted under an unapproved agreement—the remedy granted by the court would differ from that granted by the Commission. While the Commission is empowered to award reparations under Section 22 of the Shipping Act to a shipper injured by any violation of the Shipping Act, a court would award *treble* damages if the violation involved acting under an unapproved price-fixing agreement in violation of Section 1 of the Sherman Act. That result, however, involves no irreconcilable conflict.

In the present case, the Commission has already determined that the carrier-defendants did not obtain the required approval of the price-fixing agreements which allegedly injured Carnation; there is no possibility that the result of the instant suit for treble damage may be to hold unlawful what the Commission regards as authorized. But the result of the present suit may well be the granting of a remedy for violations of the Sherman Act which differs from the remedy the Commission could grant under the Shipping Act. Thus the sole question presented here is

whether the remedies of the Shipping Act were intended to foreclose the remedies of the Clayton Act even in a situation in which application of the antitrust laws could in no way interfere with the Federal Maritime Commission's primary jurisdiction to determine the rights and duties of carriers subject to the Act.

If the Shipping Act itself said nothing relevant to a reconciliation of that statute with the Sherman Act, the question as to the exclusivity of the Shipping Act's remedies would, we believe, be a close one. Section 15 of the Shipping Act, which regulates competition among carriers by requiring prior administrative approval of any anticompetitive agreement, could be viewed as merely superimposing an administrative check on a generalized congressional approval of restraints on competition in the shipping industry. Even so viewed, the treble-damage remedy would provide an extremely useful weapon in enforcing compliance with the regulatory requirements of the Shipping Act. The treble-damage remedy plays an additional, equally important, role if Section 15 is viewed, as we contend, as expressing a limited congressional willingness to waive the general competitive policy of the Sherman Act only in those cases in which the Commission does not find anticompetitive agreements harmful. If Congress thus wanted competition to continue unless and until the Commission had approved an anticompetitive agreement, the treble-damage remedy was, of course, necessary and appro-

priate to require this competition.[6] The language of the antitrust exemption in Section 15 demonstrate that Congress adoped the latter approach to anti-competitive agreements; it both intended competition to prevail until an agreement had been approved and looked to the antitrust remedies as a method of enforcing the regulatory requirements of the Shipping Act.

Section 15 of the Shipping Act contains an express exemption from antitrust proceedings and this exemption is limited to proceedings challenging agreements which have been filed with the Commission and have received its approval in accordance with the standards set forth in that section. Congress carefully refrained from extending that exemption to actions under unapproved agreements. This was in accordance with the philosophy of Congress in passing the Act—that, while some agreements controlling competition in the maritime industry may have more virtues than vices,

[6] It could be argued that in some cases a failure to file an agreement would be a mere technical default resulting from a good-faith belief that a perfectly proper agreement need not be filed, and that in such cases the more appropriate remedy would be that under the Shipping Act. But, frequently a failure to file an agreement is an action taken in bad faith in order to conceal the fact that the agreement was in violation of both the Sherman Act and the Shipping Act, and in the hope of maintaining the secrecy required to effectuate such an unlawful agreement. In this event, the treble-damage remedy is obviously more appropriate. Even in the absence of any relevant statutory language, we would believe that the better view, as a matter of policy, would be to treat all unapproved agreements as subject to the Sherman Act, simply because of the ease with which carriers could eliminate the ambiguity as to their intentions by filing all agreements which might possibly require the approval of the Commission.

no such agreement should be tolerated until it has been submitted for public scrutiny, and approved by an agency entrusted by Congress with the protection of the public interest. Allowing the treble-damage remedy for unapproved anticompetitive agreements provides valuable private sanction for inducing carriers to submit their agreements to public scrutiny and thereby bring them under more effective governmental supervision, as contemplated by Congress.

Thus, Congress has specified the result in a case such as this. The remedies of the Shipping Act for actions under an unapproved, anticompetitive agreement are not exclusive; the treble-damage remedy of the Clayton Act is available to a shipper so long as the primary jurisdiction of the Commission is respected. This is not to say, of course, that a shipper must be allowed *both* an award of reparations and a judgment of treble damages; a shipper may, perhaps, be required to elect between these remedies. If he chooses to ask the Commission for reparations—and Section 22 does not permit the Commission to award reparations on its own motion—the award of reparations might be considered as eliminating the damages which otherwise would be tripled in a Clayton Act proceeding. But this question cannot arise, and need not be resolved, in a case such as this where the shipper has not asked the Commission for an award of reparations.[7] Here, we submit, the right to treble damages is clear.

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[7] Moreover, the two-year limitations period for reparations claims under Section 22 has run on Carnation's claim.

I

THE SHIPPING ACT DOES NOT REPEAL BY IMPLICATION THE TREBLE-DAMAGE REMEDY GRANTED BY THE ANTITRUST LAWS FOR INJURIES RESULTING FROM RATE-FIXING AGREEMENTS WHICH HAVE NOT BEEN FILED WITH AND APPROVED BY THE COMMISSION

A. THE LANGUAGE AND PURPOSES OF THE SHIPPING ACT SHOW THAT ADMINISTRATIVE APPROVAL OF ANTICOMPETITIVE AGREEMENTS AMONG CARRIERS IS A NECESSARY CONDITION OF EXEMPTION FROM THE NORMAL REQUIREMENTS OF THE ANTITRUST LAWS

1. *The background of the Shipping Act.* The Shipping Act was passed following an exhaustive investigation into shipping combinations undertaken by the House Committee on Merchant Marine and Fisheries under the chairmanship of Congressman Alexander. See H. Res. 425 and H. Res. 587, 62d Cong., 2d Sess. After extensive hearings, the Committee issued a report,[8] in which it found that it was the practice of steamship lines to operate under conference arrangements and agreements for the purpose of regulating competition, and that the conference lines had been guilty of many abuses, including abuses resulting from secret agreements rather than open ones "made with the full knowledge of some legally constituted authority * * *" (Alexander Report, 307, 415, 417).[9] The Committee noted that many advantages were claimed

[8] House Committee on Merchant Marine and Fisheries, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H. Doc. No. 805, 63rd Cong., 2d Sess. ("Alexander Report").

[9] The findings of the Alexander Report are summarized in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 487-490. See, also, *Report on the Ocean Freight Industry*, H. Rep. No. 1419, 87th Cong., 2d Sess., 8–14.

to result from the use of the conference arrangements and that these advantages were not likely to be preserved by open competition.[10] In its view, these advantages could be secured only by permitting the lines to cooperate through some form of rate and pooling agreements. It repeatedly emphasized, however, that preservation of the advantages and elimination of the abuses connected with the operation of the conference system required effective governmental supervision and control. The Report states (*id.*, 417–418):

> While admitting their many advantages, the Committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision. To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action. Abuses exist, and the numerous complaints received by the Committee show that they must be recognized. In nearly all the trade routes to and from the United States the conference lines have virtually a monopoly of the line service.

Its philosophy, in brief, was that, while conference agreements may offer greater advantages than disadvantages to the public, they should not be permitted unless and until they have been scrutinized and ap-

[10] The advantages enumerated were "regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination." Alexander Report, p. 416.

proved by a governmental body charged with protecting the public interest.

2. *The language of Section 15.* In passing the Shipping Act, Congress followed the approach recommended by the Alexander Committee.[11] It did not prohibit the conference system. Rather it required persons subject to the Act to obtain prior Commission approval of rate-fixing, pooling, and other anticompetitive agreements, and exempted from the antitrust laws only such agreements as are approved by the Commission.

Section 15 states that all "agreements * * * shall be lawful only when and as long as approved by the [Commission], and before approval or after disapproval it shall be unlawful to carry out in whole or in part * * * any such agreement * * *. Every agreement * * * lawful under this section shall be excepted from the provisions of [the antitrust laws]."

As a matter of statutory construction, the phrase limiting the exemption to agreements "lawful under this section" precludes treating the exemption as also applicable to unlawful (*i.e.*, unapproved) agreements. By explicitly providing that lawful agreements are exempt, Section 15 plainly implies that unapproved and therefore unlawful agreements are not excepted from the antitrust laws. For Congress could easily have said that "Every agreement * * * of the type enumerated in this section shall be excepted from the

[11] See H. Rep. No. 659, 64th Cong., 1st Sess., p. 27, and S. Rep. No. 689, 64th Cong., 1st Sess., p. 7, accompanying H.R. 15455, which became the Shipping Act, 1916; *Isbrandtsen*, *supra*, 356 U.S. at 490, n. 11.

provisions of the antitrust laws," or "Every agreement * * * lawful or unlawful under this section shall be excepted from the provisions of the antitrust laws." Indeed, in the course of reviewing the provisions of the Shipping Act, this Court has taken it for granted that Section 15 means what is says. It noted with respect to the language defining the scope of the exemption that nothing short of approval—not even filing—is sufficient to exculpate conduct from the antitrust laws. *United States* v. *American Union Transport,* 327 U.S. 437, 445–447. The Court said (327 U.S. at 447, n. 8):

> It should not be necessary to emphasize, in view of the statute's plain language, that * * * the exemption arises *not* upon the mere filing of the agreement *but only after approval* by the Commission. [Emphasis in original.]

In so noting, this Court was merely restating a doctrine of statutory construction previously applied in *United States* v. *Borden Co.,* 308 U.S. 188, in a context closely analogous to this. In *Borden,* the district court had dismissed certain counts of an indictment under the Sherman Act on the theory that the Agricultural Marketing Agreement Act, 50 Stat. 246, 7 U.S.C. 671, *et seq.,* had given the Secretary of Agriculture plenary power over the marketing of milk, and that as a result such marketing "is removed from the purview of the Sherman Act." (308 U.S. at 197) But the antitrust exemption for marketing agreements, like Section 15 of the Shipping Act, was expressly limited to agreements approved by the officials charged with administering the statutory program. Speaking for the

Court, Chief Justice Hughes stated that "the Agricultural Act itself expressly defines the extent to which its provisions make the antitrust laws inapplicable. * * * These explicit provisions requiring official participation and authorization show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable. If Congress had desired to grant any further immunity, Congress doubtless would have said so." 308 U.S. at 200, 201.

The Congressional purpose in imposing explicit limits on the antitrust exemption of the Shipping Act is, moreover, the same as that explaining the limited scope of the exemption for agricultural marketing. Anticompetitive agreements approved by administrative officials charged with regulating an industry are very different from unapproved agreements. In *Borden,* Chief Justice Hughes explained (308 U.S. at 199):

> The Sherman Act is a broad enactment prohibiting unreasonable restraints upon interstate commerce * * *. The Agricultural Act is a limited statute with specific reference to particular transactions which may be regulated by official action in a prescribed manner. * * * To carry out that policy [of the Agricultural Act] a particular plan is set forth. Farmers and others are not permitted to resort to their own devices and to make any agreements or arrangements they desire, regardless of the restraints which may be inflicted upon commerce. The statutory program to be followed * * * requires the participation of the Secretary of Agriculture * * *.

For identical reasons, the Court of Appeals for the District of Columbia Circuit has more recently read Section 15 of the Shipping Act as requiring public scrutiny and approval as a condition of exemption. *Isbrandtsen Co., Inc.* v. *United States,* 211 F. 2d 51, 57, certiorari denied *sub nom. Japan-Atlantic & Gulf Conference* v. *United States,* 347 U.S. 990. The Commission is "the agency entrusted with the duty to protect the public interest," it said, and the condition upon which it is authorized to legalize antitrust violations is to (*ibid.*):

> scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than is necessary to serve the purposes of the regulatory statute. But until this is done, the agreement is subject to the operation of the anti-trust laws, under which price fixing agreements are illegal *per se.*

It is hardly necessary to add that this reading of the statutory language is reinforced by more recent cases emphasizing that "[i]mmunity from the antitrust laws is not lightly implied" (*California* v. *Federal Power Commission,* 369 U.S. 482, 485), because these laws reflect a deep-seated and abiding mistrust of monopoly power (*United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348; *Pan American World Airways* v. *United States,* 371 U.S. 296, 324 (dissenting opinion)) and therefore this Court will "not assume that Congress, having granted only a limited exemption from the antitrust laws, nonetheless granted an overall inclusive one." *California* v. *Federal Power Commission,* 369 U.S. 482, 485.

3. *The function served by the treble-damage remedy in furthering the purposes of Section 15.* Congress' purpose of achieving effective governmental supervision of anticompetitive agreements was served and strengthened by providing that only approved agreements are exempt from the antitrust laws. The availability of the treble-damage remedy in a case such as this has the desirable effect of encouraging injured parties to invoke a valuable private sanction that is of great aid in eliminating abuses which have long plagued shippers. Cf. *Silver* v. *New York Stock Exchange,* 373 U.S. 341; *Hewitt-Robins* v. *Freight-Ways,* 371 U.S. 84, 89. The importance of this method of enforcing regulatory requirements has frequently been recognized by Congress and this Court. In *Bruce's Juices* v. *American Can Co.,* 330 U.S. 743, 751, for example, this Court stated:

> Where the interests of individuals or private groups or those who bear a special relation to the prohibition of a statute are identical with the public interest in having a statute enforced, it is not uncommon to permit them to invoke sanctions. This stimulates one set of private interest to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement. * * *

In dealing with concealed agreements in the shipping industry, Congress had particular reason to wish to give private interests a strong incentive to combat transgressions by other private interests—an incentive which the treble-damage remedy obviously provides

to a far greater extent than does mere reparations—for the very secrecy of concealed agreements makes purely governmental enforcement a somewhat uncertain safeguard of the public interest. Congress has, for fifty years, condemned secret agreements, "for shippers have no means of knowing whether the conditions claimed by the lines for such * * * agreements are true or not * * *." It has required open agreements "made with the full knowledge of some legally constituted authority in order (1) to safeguard the interests of shippers * * *."[12] Yet the abuses of 1916 are still prevalent today.[13]

The importance of the treble-damage remedy to eliminate the use of concealed agreements which the Commission might not otherwise discover is shown by this case. If petitioner and other similarly situated shippers can recover triple damages for injuries resulting from the failure to file agreements that restrain competition, it is plain that carriers are far less likely to conceal their agreements from the Commission. On the other hand, it would serve no purpose of the Shipping Act to conclude that although the Act explicitly immunizes only approved agreements from liability for antitrust treble damages, it impliedly immunizes unapproved agreements from

[12] H. Doc. No. 805, 63d Cong., 2d Sess., pp. 307, 417; *Report on the Ocean Freight Industry*, H. Rep. No. 1419, 87th Cong., 2d Sess., p. 382.

[13] Cf. H. Doc. No. 805, 63rd Cong., 2d Sess., pp. 417–421; S. Rep. No. 689, 64th Cong., 1st Sess., pp. 9–11; H. Rep. No. 659, 64th Cong., 1st Sess., pp. 29–31; H. Rep. No. 498, 87th Cong., 1st Sess., pp. 5, 6–7; H. Rep. No. 1419, 87th Cong., 2d Sess., pp. 381–399.

such liability. "For Congress had specified the precise manner and method of securing immunity. None other would suffice." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226–227. See also, *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, 56–57 (C.A.D.C.), certiorari denied *sub nom. Japan-Atlantic & Gulf Conference* v. *United States*, 347 U.S. 990.

B. THIS CASE IS NOT CONTROLLED BY *CUNARD* AND *FAR EAST CONFERENCE*, BOTH OF WHICH INVOLVED SUITS TO ENJOIN CONDUCT WHICH THE COMMISSION MIGHT APPROVE AND AUTHORIZE

The policies of the Shipping Act are furthered—and there is no danger of interference with the regulatory scheme—when a court entertains a treble-damage action under the antitrust laws attacking conduct under an agreement which indisputably violates, or which the Commission has found violates, Section 15 of the Shipping Act. The effect is merely to provide an additional remedy for conduct which the Commission has condemned or would surely condemn. The situation is very different, however, if the judicial remedy sought is a permanent injunction against conduct which the Commission may later wish to authorize. There, the court is asked to prohibit what the Commission is empowered to permit, and the conflict is immediate and significant. That was the situation in *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474, and *Far East Conference* v. *United States*, 342 U.S. 570, which the courts below believed were applicable here.[14]

[14] Similarly, *American Union Transport* v. *River Plate and Brazil Conference*, 126 F. Supp. 91 (S.D.N.Y.), affirmed *per curiam*, 222 F. 2d 369 (C.A. 2), held that a shipper could not recover treble damages under the antitrust laws despite a claim

Both *Cunard* and *Far East Conference* involved suits for injunctions under the antitrust laws challenging the actions of carriers under anticompetitive agreements which had not been approved by the Commission. In both cases, this Court held that the antitrust suit should not proceed, at least pending an invocation of the primary jurisdiction of the Commission, on the ground that the Commission might well approve the conduct which the court was being asked to enjoin. The court was in no position to decide for itself whether the particular agreements were lawful under the Shipping Act, as this Court demonstrated in *Cunard* (284 U.S. at 485):

> The act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal.

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that defendant's action was unlawful under the Shipping Act, and had not been approved as required by that Act. The court felt that the question was settled by *Cunard* and *Far East Conference*.

Restating this principle in *Far East Conference,* the Court explained that "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over" (342 U.S. at 574).

Thus it was the holding of these cases that a court could not properly enjoin the application of agreements which might be approved under the Shipping Act and could not determine, without preliminary recourse to the Federal Maritime Commission, whether the agreements would be authorized under the Shipping Act. The regulation of ocean transportation does in fact call for a high degree of technical and expert knowledge. Accordingly, Congress entrusted the administration of the Shipping Act to an "administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal." *Cunard,* 284 U.S. at 485; *Far East,* 342 U.S. at 574–575. A related goal was the achievement of uniformity and consistency of regulatory policy. *Cunard, supra,* 284 U.S. at 482–483; *Far East, supra,* 342 U.S. at 574–575. To grant the remedy sought in those cases—an antitrust injunction—might well frustrate this need for expertise and uniformity. By awarding such relief, an antitrust court might enjoin conduct which the Commission was empowered to approve and to authorize after approval. There would thus be a direct clash between the order of a court and the powers of the administra-

tive agency. Even if the injunction were limited to prohibiting action under the agreements until they were approved, the court might well be enjoining conduct which the Commission regarded as authorized by other agreements previously approved.

These considerations are not present when the antitrust remedy sought, unlike the remedy desired in *Cunard* and *Far East Conference,* is the retrospective remedy of treble damages and when the court respects the primary jurisdiction of the Commission to determine, in doubtful cases, whether the conduct has been approved. Thus, in situations such as this one, where the treble-damage action arises from conduct carried out under an unapproved agreement, uniformity of regulation and the implementation of expertise are not threatened by the danger that a court will stop defendants from performing action which the Commission deems lawful. Section 15 states that it is unlawful to carry out unapproved agreements, so that the Commission could never make such agreements lawful as to past operations. See, *River Plate and Brazil Conferences* v. *Pressed Steel Car Co.,* 227 F. 2d 60, 63 (C.A. 2).[15] Even when carriers claim that the challenged agreements have in fact been approved, there is no occasion for conflict between the court and the agency. If the agency's position on the claim has not been made clear in previous decisions, or if the agency's expertise

[15] Of course, by approving an agreement that has previously been carried out without approval, the Commission can legalize future operations under that agreement. But this creates no court-agency conflict because the antitrust remedy applicable to future conduct—the injunction—is withheld, and the treble-damage remedy applies only to past, unlawful conduct.

is otherwise relevant, the agency undoubtedly has primary jurisdiction to determine the validity of the claim and the court would necessarily defer action in accordance with well-settled doctrine.[16] This is all that is required to preserve uniformity of regulation and expertise in administration.

Indeed, that the policies requiring reconciliation of the Shipping Act and the antitrust acts might be wholly served by invocation of the doctrine of primary jurisdiction was suggested by the Court in *Far East Conference*. The Court noted, as to anticompetitive shipping practices, that "the facts after they have been appraised by specialized competence [may] serve as a premise for legal consequences to be judicially defined" and rested its opinion upon the ground that "[u]niformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." 342 U.S. at 574, 575. Apparently recognizing that the antitrust remedies were not wholly superseded, and that even an injunctive remedy might be appropriate after preliminary resort to the Commis-

[16] In *Hewitt-Robins* v. *Freight-Ways*, 371 U.S. 84, 88–89, this Court described, with apparent approval, a procedure whereby the Interstate Commerce Commission takes primary jurisdiction to resolve technical questions requiring special competence, and a court then awards damages.

sion, the Court noted that "we may either order the case retained on the District Court docket pending the [Commission's] action, * * * or order dismissal of the proceeding brought in the District Court" (*id.* at 576–577). The Court chose the latter alternative, because "[a] similar suit is easily initiated later, if appropriate" (*id.* at 577). The Court's statement that the appropriateness of a later suit was an open question emphasizes that the only question decided was that primary jurisdiction lies with the Commission, and that the case does not hold that antitrust remedies are wholly superseded. That statement also qualifies what had been said earlier in *Cunard* (284 U.S. at 485)—that, for the injuries there claimed to justify an injunction "the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws."

Whether or not an antitrust injunction is ever appropriate after preliminary resort to the Federal Maritime Commission, there is no reason why the treble-damage remedy of the Clayton Act should be foreclosed once the Commission's primary jurisdiction to determine the rights and duties of the carriers has been recognized and respected. In this circumstance, the treble-damage remedy poses no conceivable threat to a uniform application of the Shipping Act or to the more expert judgment of the Commission. Indeed, this remedy will abet the purposes of the Shipping Act and insure the desired exercise of the Commission's regulatory responsibilities by inducing carriers to submit their agreements for approval or disapproval by the Commission.

II

THE ISSUE IS RIPE FOR DECISION

In the memorandum for the Federal Maritime Commission filed in response to the petition for a writ of certiorari, we urged that it was premature for the Court to decide the substantive issue whether the Shipping Act's remedies foreclosed the treble-damage action under the antitrust laws. We pointed out that the Commission's rulings in the proceeding then pending before it, Docket 872, might render that issue moot[17] and would, in any event, "prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court * * *". *Federal Maritime Board* v. *Isbrandtsen Co., Inc.* 356 U.S. 481, 498. After the Court granted the writ of certiorari, however, the Commission decided Docket 872. It held, among other things, that the respondent conferences had in fact entered into a number of rate-making agreements which were not authorized by Agreement No. 8200 and that these had not been submitted to the Commission for approval, as required by Section 15. Its decision has therefore not mooted the issue. Rather, it has reinforced petitioner's claim.

We believe that in the circumstances of this case the public interest would be best served by a resolution of the issue presented at this time. It is true that the Commission's decision is still subject to judicial review under the Hobbs Act, 64 Stat. 1129, as

[17] By a ruling, for example, that the allegedly unlawful agreements come within the scope of Agreement No. 8200, which had received the Commission's approval.

amended, 5 U.S.C. 1032. However, in view of the deference given conclusions of specialized agencies and the limited scope of review (*United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203; *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130–131; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297), the chances are slight that a court will overturn the Commission's finding that the agreements were unapproved, especially since the issue involves the Commission's determination of the meaning of its own approval of a prior agreement (Agreement No. 8200). See *Trans-Pacific Freight Conference of Japan* v. *Federal Maritime Commission*, 314 F. 2d 928, 935 (C.A. 9); *Swift & Co.* v. *Federal Maritime Commission*, 306 F. 2d 277, 281 (C.A.D.C.); *American Export & Isbrandtsen Lines* v. *Federal Maritime Commission*, 334 F. 2d 185, 197–199 (C.A. 9).

On the other hand, postponing decision of the question whether the antitrust damage remedy has been impliedly repealed would force petitioner to undergo once more the lengthy and expensive process of relitigating that question in the district court and the court of appeals. Moreover, it is important to the maritime industry—shippers, carriers and the Commission alike—to obtain a prompt decision by this Court on the question. Considering the importance of the issue, the fact that the Commission has rendered its report, and the unlikelihood that a court would overturn the Commission's ruling, we believe it is appropriate for the Court to decide at this time whether the antitrust treble damage remedy is available.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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